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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 537

HARRY MONFRED, JAMES SPISSLER, SAMUEL MENDELSON, SANDER A. SIEGEL, BENJAMIN M. SIEGEL AND ALBERT KING,

Petitioners,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals of Maryland, including the single dissent, is fully set out on pages 1 through 30 of the Appendix to the Petition for Writ of Certiorari (hereinafter referred to as "A") and is now reported in the Advance Sheets at 226 Md. 312 and 173 A. 2d 173.

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1961. The Respondent denies that 28 U.S.C.A

§1257 (3) or Revised Rule 19 of this Honorable Court provides jurisdiction for consideration of the instant Petition for Writ of Certiorari.

QUESTIONS PRESENTED

The Respondent accepts the substance of the Petitioners' questions except the unsupported conclusions, characterizations, assumptions and propositions not raised below, as follows:

The Petitioners made no claim of denial of due process or equal protection of the laws in either the trial court nor the Court of Appeals and therefore is improperly included as a part of the nine questions propounded.

The Petitioners' second question is not a fair statement of the legal position of the Court of Appeals of Maryland in the instant case.

The Petitioners' third and sixth questions inaccurately characterize the decision of the Maryland Court of Appeals in the instant case.

The Petitioners' fourth question incorporates an inaccurate assumption that the community was geographically undefined, since the Petitioners in the trial court recognized the geographical area in question to be the City of Baltimore (Transcript of Testimony — hereinafter referred to as "T" — pages 24 and 38) and so presented their argument to the Maryland Court of Appeals in their Brief (pages 6 and 9).

The Petitioners' seventh question is a heterogenous collection of assumptions, characterizations, and conclusions in the nature of an argument rather than an issue.

Petitioners' questions 1, 5, and 8 present a single proposition, with variations on the theme, which the Respon-

dent accepts as the only question properly presented by the Petition. These three questions might be consolidated as the issue in the following terms:

> *Does the Maryland Obscenity Statute (Section 418, Article 27, Annotated Code of Maryland (1957 Ed.)) on its face and as applied, by the Maryland Court of Appeals below, to the five magazines here involved abridge or violate the freedom of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution?*

STATEMENT OF THE CASE

The Respondent accepts the substance of the Petitioners' statement except its characterizations and conclusions of fact and particularly, the undue emphasis on the reasoning of the single dissenting opinion of Judge Hammond and the inaccurate statement that the majority opinion repudiated the "variable obscenity test." The majority opinion indicated that the variable obscenity test could have been applied in the instant case with the same result (A. 12).

ARGUMENT

Does the Maryland Obscenity Statute (Section 418, Article 27, Annotated Code of Maryland (1957 Ed.)) on its face and as applied, by the Maryland Court of Appeals below, to the five magazines here involved abridge or violate the freedom of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution?

The Maryland Obscenity Statute is valid on its face since a state has the right to prohibit the sale of obscene literature. *Roth v. United States and Alberts v. California*, 354 U.S. 476, rehearing denied, 355 U.S. 852, and *Near v. Minnesota*, 283 U.S. 697, 716. The trial court properly found the Petitioners guilty of selling obscene literature

when they sold the five magazines to the plain clothes police officers. The five magazines (*Cloud 9, Sextet, Consort, Torrid, and Candid*) were introduced against the Petitioners in the trial court. The trial court, applying the test laid down by this Honorable Court in *Alberts v. California*, found as a fact that each of the five magazines was obscene: that is, to the average person, applying contemporary community standards in Baltimore City, the sole theme of the magazines, both pictorial and narrative, was a direct appeal to prurient interest. The Maryland Court of Appeals made an independent appraisal of each of the magazines and found the judgment of the trial court to be correct as to these five magazines and affirmed the convictions.

The main thrust of the Petitioners' argument is an attempt to distort the clear standard laid down in the *Alberts* case to be a mandate that only so-called "hard-core pornography" is obscenity. In order to arrive at this position, the Petitioners ignore the clear statement, in this Honorable Court's majority opinion, that the test for obscenity is: ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (page 489).

The Petitioners' conjecture that this statement is subordinate to an explanatory foot-note which quotes an editorial discussion of the subject in a tentative draft to the Model Penal Code. This is only the first step in their circuitous process. The next step is to substitute the reasoning of law writers (Lockhart and McClure, 45 Minn. L. Rev. 5), conjecturing on the opinion and subsequent *per curiam* actions of this Honorable Court, for the clear lan-

guage contained in the majority and concurring opinions in the *Alberts* case.

At this point we arrive at a new vocabulary. Dirty books are now labeled "girlie magazines" and the dictionary definition of pornography is ignored. The confusion over the true meaning of pornography is compounded by adding non-descriptive adjectives such as "hard-core", whatever that is. Perhaps "hard-core" means the lowest conceivable level. The hawkers of filth, in order to give their trade an air of respectability and their products an innocuous title, create new words and new definitions which are bandied in the criminal courts and appellate briefs with the hope that their quotation in some opinion will establish an authoritative basis and legitimatize their birth. We find the Court of Appeals of New York talking about "hard-core" pornography as if there were such a thing. *People v. Richmond County News, Inc.*, 175 N.E. 2d 681, 685. Even our own Court of Appeals of Maryland finds itself loosely referring to the lewd exhibits as "girlie magazines", *Monfred v. State*, 226 Md. 312, 315, 173 A. 2d 173. This is the first step in the dirty book industry campaign of confusing the issue by inventing innocuous terms and artificial categories. It is reminiscent of the theories propounded in Hitler's *Mein Kampf*, Chapter VI, "War Propaganda": Keep repeating the proposition long enough and it will be accepted. It is appropriate to note that the lexicographer still considers pornography as "description of prostitutes or prostitution." *Webster's Third New International Dictionary*, Unabridged (1961), page 1767. The English language still recognizes that pornography are stories about prostitutes. There is nothing in the pictures or the stories contained in the five exhibits which would derogate that definition. Certainly the nudes and semi-nudes are not posed by virtuous women.

The attempt to cloud the issue is not limited to semantics. It is difficult to reconcile the conflicting arguments of the Petitioners. On one hand, they bitterly complain that the Court of Appeals of Maryland did not make an independent appraisal of the five exhibits, and on the other hand, they completely ignore both the pictures and the narratives of the exhibits in their protracted argument in support of their petition to this Honorable Court. If the Petitioners believe that the exhibits require an independent appraisal by an appellate court, it is hard to understand why they completely ignored the exhibits in their petition and were satified to present profound arguments on abstract constitutional propositions rather than to face the facts.

The Respondent believes that the parties, as well as the Court, must face the facts. In this case the facts are the five exhibits.

Cloud 9 was introduced in evidence against Petitioner Mendelson. This exhibit is the longest of the group and within its eighty pages are exposed at least one hundred twenty-five bosoms to frame and support its twenty lewd articles. Essentially *Cloud 9* is a handbook for seduction. In a pseudo-sophisticated manner it glorifies illicit sexual intercourse, discusses male and female sex psychology and lays down guide lines for illicit sexual seduction. The first article is "Deep Sleep, Sound Sleep" which is the story of a man trading to a hypnotist an introduction to his former paramour in return for the hypnotist's overcoming the sexual inhibitions of his current girl friend. Typical portions of the text are:

> "In fact, she was the living embodiment of every erotic dream Frank Jackson had ever enjoyed . . ." (page 5).
>
> • • • • • •

"His hands itched to explore the ripe curves of her body and his loins ached to find fulfillment in the glory of their love" (page 5).

* * * * * *

"She was radiant and happy and sexy and she wasn't wearing any clothes. Neither, for that matter, was he.

"'My darling,' she said, pressing her warm nudity into his arms. It was right -- there was no fear in her eyes, no reluctance to engage in the most intimate embraces. They floated together on the velvet cloud, doing things they both wanted to do, and do them expertly. It seemed as if Norma had taken lessons from all of the women Frank had ever shared his pillow with, and improved upon their techniques.

"'Frank,' she whispered. 'Take me, my lover. Take me strong.'

"It was like a dream, but it wasn't one of those frustrating dreams when you wake up just before the final moment. Together they tasted the highest points of ecstasy, merging in a glorious explosion of body and mind and emotions which left them clinging together totally exhausted" (page 36).

* * * * * *

"When you reached your climax under hypnosis, you moaned the name Corrine over and over . . ." (page 36).

* * * * * *

"Her fingers make quick work of the buttons, buckles and zippers of his clothes" (page 49).

* * * * * *

"With satisfaction, he saw her face grow tense with pleasure and her eyes glaze over with ecstasy — and then the demanding pressures of his own body erupted in a volcano of passion, sending hot waves of lava coursing through him . . ." (page 49).

There is a dissertation on analyzing women as a prelude to seduction in "The Other Side of Cloud 9".

> ". . . the right man, the right place, the right time and nothing can keep her away from it" (page 6).

* * * * * *

> "How you handle the circumstances of the powwow with her shows whether you're a wow or a bowwow in the art of seduction *a la mode*" (page 6).

* * * * * *

> "The other side of Cloud Nine, for the benefit of those who haven't figured it out for themselves, is that place in time and space where two bodies (yours and her), two hearts, two souls merge together as one, to the delight of both. It's that point when her charms are in your hands, her arms are around your neck, and the rest of you is doing what comes naturally" (page 6).

* * * * * *

> "'How do we know we're *right* for each other?' you ask. 'Maybe a trial marriage . . .' And a sample honeymoon on Cloud Nine, of course" (page 13).

* * * * * *

> "But watch yourself in the clinches when you take her to the other side of Cloud Nine. Some gals are downright tricky. You could be inducted into fatherhood just like that" (page 13).

The article "What's Your Line?" tells the young man how to use a girl's hobby as a means of seduce her.

> "If you're young, footloose, fancy-free and have a fad for the fillies, there's nothing more delectable than a seductive sweetheart to make the scene with you at your diggings of an evening. Collecting cuties is our favorite hobby, friends; and yours, too, or you'd not be reading these words" (page 22).

* * * * * *

"Speak to a wary wanton of her hobby and you can get her in your sack" (page 22).

* * * * * *

"Let your hand brush, and rest, gently against her breast as you hold a button at the right angle to the light. If she catches her breath but doesn't push your hand away, well, what the hell, man!" (page 22).

* * * * * *

"When you've unbuttoned the last of her buttons and slipped the last wispy garment from her flushed and glowing body, let your gently questing fingers find and caress those pink, *natural* buttons straining up to meet your titillating touch" (page 22).

* * * * * *

"As you remove the last stitch from her quivering body it strains convulsively against yours. And once again Grandmother's quilt yields to the rhythmic throbbing of two bodies shuttling in unison as you stitch that fine seam" (page 23).

Female psychology, as an introduction to seduction, is the theme of "Make Hay". It contains many guides to seduction techniques as well as translations of the various customary femine verbal declinations.

"With your other hand unfasten the neck of her dress. And if still her hands have not deterred yours, turn back to the first position, remove her dress, unsnap her bra — and now each hand can cup the coral-tipped mounds of loveliness swelling out to meet them. "If now you can't lead her to your couch, discard the last wispy, clinging garment and seek out one by one each thrilling secret from the front. . . ." (page 31).

"Hidden Power" considers the importance of women's underclothing in aiding women to seduce men. "Rear Window" discusses the effect that a nude cavorting before a window has on men. In a change of pace mood, while maintaining the same theme, we have the story "Tunnel

of Love." This short, short story tells about a forty year old married man who has adulterous sexual intercourse with a seventeen year old unmarried girl during a six minute ride on an amusement park boat going through the tunnel of love.

> "Her hard young bosom pressed against his chest, and he could feel two harder points rising, urging, demanding attention through the thin cloth of his sportshirt. Her arms went around his neck, drawing his head down, and she pressed her lips to his; in a moment they had opened and a hot fire invaded his mouth, smooth and sleek, fierce and darting . . .
> "From his lips, her mouth went to his ear. '*Take me*,' she whispered hoarsely, raggedly. Her breath roared against his eardrum — the hot fire was thrust in, deeply, wildly, withdrawn again 'Please . . . now! *Quick!* Make it hard — make it mean!' " (page 26).
>
> • • • • • •
>
> "His hands clutched at twin handfuls, but then raced on to more vital territory, for there wasn't any time for preliminaries" (page 26).
>
> • • • • • •
>
> ". . . and with the barest minimum of garments pushed aside to permit what must be, they clung together in a sudden violent few moments of ecstasy, lips and bodies joined firmly in the lurching bucket-seat, the position perhaps ludicrous, but the result one of the most animally satisfying he had ever known . . ." (page 26).

The element of surprise is advocated as an effective means of seducing allusive and shrewd women in "Passing Pantsies". The author drags out the theme by repetitious lewd language.

> "This is where you learn what separates the men from the boys in the gentle art of seduction" (page 53).
>
> • • • • • •

"You still yearn to hustle in her bustle" (page 54)

* * * * *

"You come right out and tell her, practically in so many words — but not so incautiously even yet as to neglect the proper buildup — that you want to romance in her pants" (page 55)

"Double-Feature Darlings" provides instructions for seduction at drive-in theatres.

"... Hollywood just doesn't make flicks which can compare with the intimate unveiling of the flesh-and-blood charms beside you in the front seat" (page 58)

* * * * *

"... to improve your approach so that you can overcome every objection the girl might raise to your exploring fingertips, wandering hands and searching lips. After all, maids were made to be made, so there's no point in going against Nature" (pages 58-59)

* * * * *

"Although she may refuse to go all the way at the drive-in, the odds are favorable that she won't object too strenuously to stopping briefly at a motel on the way home" (page 59)

* * * * *

But, if she responds 'You think he'd do a horrible thing like that?' — you know that seduction is her dish, so act accordingly. Key words and phrases tossed into a conversation can save you many hours of trial and error" (page 61)

Reverse psychology is recommended for seducing the reluctant female type by the author of "Maid To Order".

"'Give me two weeks with a girl and I'll score a conquest'" (page 62).

* * * * * *

"Then she slowly comes out of her cocoon and bursts forth as a naked nymph who has shed her 'platonic' inhibitions along with her clothes" (page 64).

* * * * * *

"And, brother, this merchandise not only looks good — it feels even better. It'll be a long time before you drag yourself out with Buddy Babe now your Bosom Buddy" (page 64).

* * * * * *

"You say you've never made love with all your clothes on? Don't knock it until you try it — and when you do, offer thanks to the man who invented the zipper" (page 65).

The use of the telephone as an adjunct to seduction of desirable women is described in "The Belle System".

"Therefore, the man who wants to keep his bed warm learns early in life to be a master of telephonic seduction. In fact, one man we know is so inviting on the telephone that he has to rotate his women in shifts, in order to avoid having more than two of them in his bed at one time" (page 69).

Further instruction in seduction is provided in "A Bird in the Hand". The author uses avian jargon interspersed with pure prurience.

"There's the sweet white meat of tender breast swelling up to meet your searching fingers" (page 73).

* * * * * *

"Hackle to hackle, you'll float on love's wings as your hands find and caress the exciting rondure of those pink-tipped globes too long hidden from your gaze" (page 73).

* * * * * *

"Your hands, unchecked, will seek out each tender, inviting, seductive curve of her virginal body as it arches to meet yours in sweet surrender" (page 74).

* * * * * *

". . . you thrill to the delights of each other in the velvet darkness of your bedroom" (page 74)

The effect of the changing world on changing sex techniques, with special emphasis on transportation problems and the time factor, are considered in "Supersonic Stalking". The author compares transcontinental wagon train techniques with the problem of sex on jet airliners. In the customary fashion, the lascivious language is bracketed with semi-nudes.

"You decided in Indiana that she was ripe and ready to be plucked" (page 76).

* * * * * *

"As a strapping young pioneer, you had all the time in the world to further your conquest of the pretty, picturesque pioneeress" (page 76).

* * * * * *

". . . talking her into your trusty bedroll, where you then peeled her like a ripe banana, explored the uncharted virgin wilderness of her eager charms, and prepared to taste her heretofore forbidden fruits" (page 76)

* * * * * *

"Her bounteous bosom might heave spasmodically at the thought, threatening to burst through the thin fabric of her blouse. " (page 76)

* * * * * *

"Where he can protect her, shield her from the unknown, all the time gradually breaking down her will" (page 79)

This review of *Cloud 9* suffices to establish that the sole reason for publishing the magazine is to make a profit arousing prurient interest and encouraging, aiding and abetting illicit sex relations by seduction. *Cloud 9* runs the gamut of seductive techniques: hypnosis, direct and reverse psychology, use of female inclinations and hobbies,

the telephone approach, the role of underclothing, the use of surprise and the employment of the time factor in obtaining illicit sexual intercourse.

Regardless of the Petitioners' glib semantics and artificial categories, such as, "girlie magazines" and "hard core pornography" it is crystal clear to any normal person that this is obscenity.

Sextet was introduced against Petitioners Mendelson and King. It is a fifty page magazine containing eleven articles. There are more photographs and drawings emphasizing or exposing the female breast than there are pages in the book, that is fifty-two illustrations within the fifty pages. There are at least five stories in the eleven articles. "His Only Weakness" is a lewd narrative detailing the seduction of a hardened woman by a philanderer. Some typical extracts from the narrative are:

> "'That's my proposition, Mr. Horne. If you want me in bed, now's your one and only chance,' said Janice Bristle" (page 4).
>
> • • • • • •
>
> "Nothing like a woman putting up a good fight before she drops her panties" (page 6).
>
> • • • • • •
>
> "He'd always figured himself as being very fair with all the broads he'd been to bed with" (page 6).
>
> • • • • • •
>
> "Now he was absolutely sure he was going to have Janice. And, if necessary, he would make it by force. Sort of an unlegalized rape" (page 6).
>
> • • • • • •
>
> "No woman had ever escaped his lust before . . ." (page 6).
>
> • • • • • •

"'Janice, suppose you let me feel you'" (page 40).

* * * * * *

"He could see her delicious breasts straining against the material of her smart black dress" (page 46).

* * * * * *

"He didn't say a word. He just nodded his head, leaped forward, grabbed her hand and dragged her into his bedroom.

"When it was over, they laid quitely on the bed . . . naked and exhausted" (page 41).

The article "Paper Back Girls" emphasizes the increase in the sexual aspect of cheap literature. Some extracts are as follows:

". . . she is practically a virgin because she had only been to bed with eleven different men, not counting those before she was thirteen" (page 11).

* * * * * *

"'Kiss me . . . I haven't been laid in more than six months . . . she reached up and, with a terrific yank, ripped the front of her dress wide open baring her breasts . . . rich, sexual woman was everywhere . . .'" (page 12).

It also contains "Cherry Orchard", the story of a minor seduced by a prostitute. Some excerpts are:

"Larry's pants bulged with the thought" (page 17)

* * * * * *

"What a broad to pop with! The sweater was still unbuttoned. He swallowed hard and crossed his legs" (page 18).

* * * * * *

"'Great!' Bruce yelled back. 'Go lay 'im!'" (page 18).

* * * * * *

"Her whisper was almost a sexual action. 'Your place or mine?'" (page 19).

* * * * * *

"She moved her groin hard into his" (page 19).

* * * * * *

"She said, 'I'll let you take the panties off. Guys like to do that' " (page 19).

* * * * * *

"He felt her thigh . . . her leg . . . her pelvis" (page 19).

In keeping with the theme is "A Date With Judy", which is the fantasy of a partially nude woman inviting a male to her house.

"'I'm so happy you could come,' she purrs with a sexy smile and a suggestive pose of welcome" (page 21).

* * * * * * *

The final major article is "Tahiti-Land of Free Love". This is the narrative of an American tourist's economy visit to Tahiti with the expected plug for sex, including perversion.

"Strangely enough, homosexuals and lesbians also are accepted as a part of the community and are even looked upon with a sort of pride. The natives consider them a bit above the average, going back to ancient legends concerning 'fairy' gods — literally — and many of them hold high places in the community" (page 36).

This is the sort of pulp the Petitioners would label "girlie magazine", whatever that is. It can hardly be doubted that the "dominant theme of the material taken as a whole" in *Sextet* "appeals to prurient interests" and it is inconceivable as a matter of fact that the "contemporary community standards" in Baltimore, or any other place in Maryland, is so depraved or perverted that this type of magazine is accepted by the average person. What the community tolerates and what appeals to the lowest elements is not to be mistaken for the contemporary com-

munity standard otherwise the moral standards of our civilization would be embedded in sand.

The other exhibits follow the pattern. *Consort* which was introduced against Petitioner Spissler is a fifty page magazine containing fifteen articles. There is a slight diminution in the number of bosoms and buttocks exposed. In *Consort* there are only thirty-seven bosoms exposed. The main narrative seems to be "Dory", which is the story of a girl suffering from amnesia and exposure sleeping with a young ship carpenter in his lonely hut.

> "In the dark he could feel her inching closer to him, sliding her hips over the rough blanket until the apex of her abdomen rubbed against his trembling thigh, brushing his hairy limb with a gentle, insistent gliding motion" (page 49).

There is also "Charlie's Mark Won", which is a sexual fantasy concerning a lusty space man entrancing and abducting an astronomer's girl friend while a space female stays behind to seduce the astronomer. There is a story of a sexual escapade which establishes a minor stepdaughter as mistress for her step-father in "Delay in Route". Across the page from two suggestive photographs, emphasizing large bosoms and seductive smiles, is the following:

> "She did. Jacket off (only a bra underneath). Bra off (only Bermudas). Bermuda's off (only *her* underneath), and I was off the road" (page 24).
>
> * * * * *
>
> "I wasn't dreaming. The next time I awoke she was asleep beside me. Beside being the owner of a fantastically animated collection of soft curves, she had the most delightful talent for telling pornographic tales . . . in pantomime and braille. She was a deliciously naughty nymph" (page 48).

* * * * * *

"By the time we pulled into Miami, I had reached an agreement with my new blue-eyed mistress" (page 48).

There are also advertisements for suggested female bed attire (page 38). One item is described as

". . . edged in luring-lace make this the perfect costume for your 'show of shows' . . ."

The magazine *Torrid* was introduced against both Petitioners Siegel. This forty-eight page magazine contains thirteen articles and displays in photographs and sketches some forty-three exposed bosoms. The publisher of the magazine quite frankly indicates that he is interested in appealing to prurient interest when he states on page 2 that:

"TORRID-ity (if we may develop the phrase) is the ability of a girl to arouse within the male animal, be he man or mouse, the desire to know more about this girl . . . to find out what she has that thrills him, makes him want her."

* * * * * *

". . .; we feel certain that the assemblage of photos, fact and fiction, here will do much to make you realize it is not horrid for a girl to be TORRID."

This statement of policy and purpose is appropriately bracketed by semi-nudes with suggestive countenances. There is the story of the "Spanish Bed" with reference to illicit sex relations between a prostitute and her favorite lover, a murdering bank robber, whom she ultimately kills for infidelity. The heroine is described as:

". . . the only full time whore in the dirty little town of Rio Conchos" (page 5).

The story explains:

"Justa had received the bed from a reckless bandit who lived and worked in the Diablo country. She had

given herself to him in a series of exhausting but extremely satisfactory affairs and the bed was his parting gift to her" (page 6).

The reunion of the robber and the prostitute is detailed.

"His eyes carefully examined each point of interest of her naked body."

* * * * * *

"After all, she was a fairly decent girl . . . as decent as any prostitute can be."

* * * * * *

"She led him to the Spanish bed and, on top of the worn rainbow serape, their bodies met" (page 7).

Among the other articles "Is the Baz-o-o-m Boom a Bust?" This is a dissertion on current female clothing styles and the size of a woman's breast. The bare bosomed pictures punctuate each page which teems with suggestive lewd language.

". . . Lisa Romano, who boasts an unconservative measurement about the upper torso of forty-one luscious, shapely, pick-nippled inches" (page 9).

* * * * * *

"'Do I look flat-chested'? she repeated, a menacing tone entering her husky, sex-heavy voice" (page 10)

* * * * * *

"After all, how long is a man supposed to remain rational and businesslike, when a gorgeous red-headed being is perched on the pool ladder wearing nothing but the bottom half of a bikini, while those delightful globes heave and shake in your general direction?" (pages 10-11).

Candid magazine was introduced against Petitioner Monfred. It is a fifty-two page publication containing twelve articles. The seventy-four bare bosoms far exceed the number of pages. In a self-confessional style one of the

articles is entitled "Pornography is Big Business". The criticism of obscene movies in "Sex Olympics of the Movies" sounds like a statement of the magazine's editorial policy.

> "The movie producers around the globe, all looking for the fast boxoffice buck, have placed themselves in the competitions to turn out the 'most adult' films possible without going to jail. In this case, the term 'adult' is synonymous with Sex, and the only thing mature about many of the current offerings is the fact that the law requires that an *Adults Only* sign be hung over the boxoffice window" (page 31).

If one goes to the cover of *Candid* we find the statement printed: "For Adults Only". Having sanctimoniously criticized their competitors in obscenity, they have an article entitled "How to Undress for a Man". With many photographs of semi-nudes in the process of undressing we find a list of rule for arousing a man by undress technique.

> "(6) If you are going to wear a nighties for this occasion, be certain it isn't created by one of those fanatics on birth control and resembles a straight-jacket. Make it loose and easily removable."
>
> * * * * * *
>
> "There, see how simple it is? Really quite painless . . . for everyone except the man you're out to get" (page 20).

There is the story of a deserted husband's bedroom escapade with a prostitute, whom he ends up physically assaulting, entitled "The Last Orgy".

> "Curling her long tanned legs under her, she moved against him so her breasts moved up into the palm of his hesitant hands."
>
> * * * * * *
>
> "The girl on Stan's lap bolted up, unconcerned that her blouse billowed open, bearing her heavy, magnificent

rose-tipped breast. Half tripping, she moved toward Charlie, her watery eyes livid with desire."

* * * * * *

". . . tossing her head ecstatically so Karen could witness the beast she'd failed to arouse . . . Kitty began to moan, her almond-like eyes narrowing impulsively. 'Let's go upstairs, honey!' "

* * * * * *

"He wanted the utter satisfaction of all-out ribaldry. He'd come to the right place."

* * * * * *

"Kitty's arms fell to her side as she lazily slipped to the bed."

* * * * * *

"She noticed his eyes trying to avoid her half exposed breasts" (page 18).

* * * * * *

"She teasingly unzipped her skirt."

* * * * * *

"The sounds stopped as their lips fused hotly and his hand moved knowingly under her blouse."

* * * * * *

" 'Now, Charlie — now' she cried" (page 19).

Although the Respondent insists that the Petitioners must candidly face each of the exhibits as a whole, since they constitute the primary fact of the case, nevertheless the Respondent respectfully submits that the entire Petition is predicated on a series of fallacious legal arguments.

The principal contention of the Petitioners is that, notwithstanding the clear statement of law laid down in the *Alberts* case, this Honorable Court has now adopted a requirement that only the pictorial or narrative presentation of sex in a perverted manner or in a disgustingly un-

realistic manner can be lawfully forbidden by the states. This is the party line of the dirty book industry. The Court of Appeals of Maryland had such argument presented to it, but it was not misled or frustrated into accepting such a proposition. The Court of Appeals of Maryland carefully analyzed the several concurring opinions of this Honorable Court in the *Alberts* case, and in light of the *Alberts* opinion, considered the three *per curiam* reversals which followed (*Times Film Corporation v. City of Chicago*, 355 U.S. 35; *One, Incorporated v. Olesen*, 355 U.S. 371; and *Sunshine Book Company v. Summerfield*, 355 U.S. 372), together with *Smith v. California*, 361 U.S. 147. The Court of Appeals of Maryland was satisfied that this Honorable Court meant what it said in the *Alberts* case. Unfortunately, other courts have reluctantly accepted the distortion which is continually presented by the local representatives of the dirty book industry in obscenity cases. Compare the majority opinion and the concurring opinion with the dissenting opinion in the recent 4 to 3 split of the Court of Appeals of New York in *People v. Richmond County News, Inc.*, 175 N.E. 2d 681, *supra*. In the confusion, even the majority could not find a common ground of agreement. Judge Hammond below was led into the same error. Judge Hammond's reasoning, as well as the reasoning of the two majority opinions in the Court of Appeals of New York, and the Lockhart and McClure article in the *Minnesota Law Review* lent some support to the party line of the dirty book industry prior to the recent refusal of this Honorable Court to review the convictions of obscenity in the Wisconsin case of *State v. Chobot*, 106 N.W. 2d 286. In the *Chobot* case, the Supreme Court of Wisconsin took action on all fours with the action of the Court of Appeals of Maryland. In the *Chobot* case, the Supreme Court of Wisconsin closely analyzed this Honorable Court's opinion

in the *Alberts* case and carefully distinguished between the several publications before it on appellate review before affirming the convictions. It is curious that the Petitioners overlooked the *Chobot* case (Number 146) in their argument and particularly this Honorable Court's refusal to review the obscenity conviction which was publicized in 30 *Law Week*, 3128, dated October 24, 1961. It is the Respondent's position that this Court's action in the *Chobot* case (82 S. Ct. 136) is a decisive answer to all of the law arguments presented by the Petitioners.

If this Honorable Court had not already decisively disposed of the Petitioners' primary argument, the Respondent would willingly have joined issue on the numerous peripheral contentions made by the Petitioners.

The Petitioners went to great length in discussing the fact that the exhibits in the instant case were magazines and not books. Although the Respondent has never differentiated between obscene books and obscene magazines, perhaps the Petitioners were conscious of the fact that books are inherently limited in the amount of pictorial support which the lewd narrative can receive, whereas, in the magazine there can be more naked pictures than there are pages and the magazines can be more easily peddled to minors because of the reduced cost of production and their susceptibility to distribution in drugstores and candy stores. This is perhaps the reason the Petitioners felt the necessity for their anticipatory defense.

The Petitioners seem to be unduly disturbed by the trial court's observation that the instant exhibits were not "literary in nature, artful in presentation, nor innocent in purpose" (A. 31), and defensively assert that the instant exhibits are not utterly without redeeming social importance (P. 34). This is a difficult argument to under-

stand. If the Petitioners were defending controversial writings in the field of theology, government, economics, or the physical sciences, the Respondent could appreciate the necessity for new thinking as a means of insuring progress or testing the continuing validity of pre-existing principles and theories. But it is not easy to believe that sex would go out of style or procreation would be stymied merely because highly provocative sex magazines were removed from the candy stores. It is an obviously specious argument that the pictorial display of prostitutes, supported by the rehash of sexually provocative narration by hacks contributes to the strength, wisdom or the progress of our Democracy. It would be an argument becoming to the defenders of the lustful excesses of Rome on the eve of her fall. The lowest standard is not the only standard of freedom nor is the economic law of supply and demand the only limitation on freedom of speech and freedom of press. The exhibits in this case are the work product of the filthy industry which employs and poses prostitutes, engages hack writers to reword the trite but provocative lewd narratives, puts the pictures and the stories together in a cheap magazine format, then bundles the dirty books into the drug and candy stores through its interstate tentacles, and thus realizes a dollar profit from the exploitation of human frailties. When the local peddler violates both community sensibilities and the local law and he is convicted in the State courts, the industry will see that eminent counsel from a state across the nation appears to contend for the lofty constitutional principles of freedom of speech and freedom of press.

The filthy book industry lost its first battle in the *Alberts* case. They were so indifferent to public sensibilities that they did not seriously argue the contents of the publication. They hoped that this Honorable Court would use the First

Amendment as a shield for obscenity even in the abstract. Having lost that battle, they now seek to have the definition of obscenity so broad that it is meaningless. On one hand, they are delighted with this Court's ruling in *Butler v. Michigan*, 352 U.S. 380, that an obscenity statute cannot be based on a minor's reading level, but on the other hand they are not satisfied to have an average, decent adult as a standard. Under the filthy book industry's semantics, an adult, who does not accept as a part of his life and as a part of the standard of his community a continual flood of the pictures of naked prostitutes and stories obsessed with sexual matters, is unrealistic, unsophisticated, and immature. The only adult to be considered is the philanderer and the pervert. In arriving at a standard, an adult cannot consider his feelings as a parent nor the normal sensibilities of mixed gatherings. What the average male might accept at the stag smoker is to be the standard for his home library. Such arguments of realism are unrealistic.

The Petitioners complain that the community was not defined. This argument occurred to them only after they read Judge Hammond's dissenting opinion, for they certainly did not raise it in the trial court nor in the Court of Appeals. In the trial court it was clearly understood by all parties that the community was the City of Baltimore (T. 24 and 38). This was the basis of the Petitioners' arguments in their Brief before the Court of Appeals. It is too late to raise it initially on a Petition for Writ of Certiorari.

The Petitioners complain that the community standard was merely the private opinion of the trial judge and, in a derogatory manner, imply that he was divorced from the facts of life (their Petition, page 29). The Respondent believes that judges by virtue of their appointments do not forthwith lose their experience and become divorced from

the facts of life. The trial judge below must have had some acquaintance with community standards in order to be twice elected as State's Attorney for the City of Baltimore prior to his election to the bench. If the Petitioners seriously thought that the community standard accepted their dirty books they had adequate opportunity to present such evidence in the trial court and not limit their presentation to an eliciting of vague statements from State witnesses on cross-examination. There was no real attempt to define what similar publications had been sold and where in the City of Baltimore during the preceding five years. This Honorable Court has never ruled that a trial court cannot take judicial notice of the community standard in the absence of decisive direct evidence. The Petitioners' contention that "experts" should have been presented is hardly serious. The community standard is an ultimate question which is for judicial determination and is not controlled by the testimony of expert witnesses — if there be such witnesses. The fact that a particular community may tolerate isolated instances of disorderly houses and the sale of lewd literature does not *per se* establish that as the norm.

The Petitioners complain that there was no expert testimony on the effect of their exhibits on an average person. This also is an ultimate question for judicial determination, and although the Petitioners imply that judges are set apart from their fellow men, there is no substantial basis for believing that a judge has lost all recollection of his experiences in passing through puberty, adolescence and early manhood. It is no more difficult to determine an appeal to prurient interest than it is to determine the legal concepts of negligence, intent to defraud, wilfulness and deliberation in murder, and other technical terms of law.

The difficulty is always asserted by those who are hoping to benefit by the confusion they create.

Even if the Maryland Court of Appeals had accepted the numerous qualifications which the filth industry semanticists proposed, these five magazines would still qualify as obscenity. The New York Court of Appeals adopted the industry's position, *People v. Richmond County News, Inc.*, 175 N.E. 2d 681, 686, *supra*, in construing the word *obscenity* in their law to mean:

> "It focuses predominantly upon what is sexually morbid, grossly perverse and bizarre without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' . . . Depicting dirt for dirt's sake, the obscene is vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty'."

If we limited ourselves to this, the broadest definition adopted by any state court, would not the five magazines here qualify? Consider "Tunnel of Love" in *Cloud 9, supra*; "Cherry Orchard" in *Sextet, supra*; "Charlie's Mark One" in *Consort, supra*; and "The Last Orgy" in *Candid, supra*. Even if realism was a justification, these articles would be an insult to sex. Excesses and perversion could hardly be considered normal and realistic. The provocative and banal sex situations, rehashed with emphasis on shock and supported by unnatural pictorial poses of prostitutes, can have little claim to realism and the normal conduct of any community.

The Petitioners contend that there was no testimony that they had knowledge of the contents of the exhibits.

This contention flies in the face of the record in the trial court, where the officers testified that they had discussed the lurid aspects of the books with the defendants or their agents prior to the sale (T. 18, 29, 36 and 45). On the face of the record these exhibits could qualify as trade magazines for the waiting rooms of disorderly houses. Even in the absence of testimony, the trial judge would have been justified in inferring knowledge of the magazines' contents from the provocative pictures and statements on the outside covers of each.

The Petitioners contend that this type of publication is now accepted by all normal people. In support of this proposition, they attempt to belatedly introduce into evidence, by argumentative reference and characterizations in their Petition, numerous hard-back books and motion pictures. Since these pictures and books were not offered or tendered in the trial court, they are not properly considered initially on appeal. It might be observed that if the books and pictures are as lewd as the Petitioners would have us believe, perhaps the police have not been as diligent as might be desired in enforcing the obscenity law. Certainly the Petitioners are not propounding the legal proposition that two wrongs would make a right. The short answer is that only the five exhibits are before this Honorable Court, and there is no need to make an excursion outside of the record for material which the Petitioners did not see fit to even tender the trial court.

The Petitioners contend that the Court of Appeals of Maryland abdicated a duty to make an independent appraisal by affirming the trial court to the extent that such court was not clearly erroneous. The Petitioners have a curiously inconsistent argument. They contend that the

Court of Appeals did not make an independent judgment notwithstanding the Court of Appeals' express statement in its opinion that it had (A. 3 and 5). Respondent has no reason to impugn the accuracy of the Court of Appeals statements, which in any event is corroborated by the fact that it distinguished the striptease photographs and *Black Garter* from the instant five magazines in reversing as to the former and affirming as to the latter. On the other hand, the Petitioners admit that the Court of Appeals distinguished between the six magazines (which they contend are all the same) but assert such differentiation constitutes a denial of equal protection of the laws. This position is difficult to reconcile with their apparent support of the variable obscenity theory.

The Petitioners contend that there is no proof that lewd pictures and narratives have any effect on conduct. Both Judge Hammond dissenting below and the New York Court of Appeals quoted with apparent approval the law writers to the effect that there is little "scientific evidence" and no "genuine research" of the effect of lewd literature upon behavior. It is difficult to reconcile the claims to realism, naturalism, and sophistication with the criticism. This is an offspring of the current fad which believes that there is no truth outside of the experimental sciences; nothing is true unless some scholar has run a test or written a thesis. This dogmatic allegiance to experimental science was the subject of discussion by Robert M. Hutchins in his prefatory remarks to 1 *Great Books of the Western World*, Chapter 5. Dr. Hutchins is of the opinion that the social sciences are not presently adaptable to experimental method as the *sole* means of arriving at knowledge and that much is to be learned from our great tradition. When the Lord commanded: "Neither shalt thou desire they

neighbour's wife, neither shalt thou covet thy neighbour's house. . . ." (Deuteronomy 5:21). He did not produce any *scientific evidence* or *genuine research* to establish a correlation between thought and action. Nor did He think that there would be any social benefit by potential wrongdoers having a psychological substitution of thought for action. There is no need to produce testimony on the obvious and on those matters which are the basis of common knowledge and experience. This is properly an area for judicial notice and reasonable inference. Most human emotions are not subject to mathematical exactitude.

CONCLUSION

Considering each of the five magazines separately, it is unmistakenly clear that there are almost as many nude and semi-nude pictures and sketches as there are pages in each book. The purpose and meaning of the photographs is readily ascertainable from viewing the suggestive countenance and lewd poses of the female models while reading the indecent sex narratives which surround them and support them. The single theme of all the stories is illicit sexual intercourse. The single purpose is to entertain the philanderer while teaching the adolescent. With such a factual situation, there is no area for doubt, and it is obvious on appellate review, that the average person applying community standards would determine that the dominant theme of each of these magazines, taken as a whole, appeals *only* to prurient interest. This Honorable Court's definition in the *Alberts* case was applied by both the trial court and the Court of Appeals of Maryland. This Honorable Court has indicated that where its standard has been fairly applied, by both the state trial court and the state appellate court, it will not grant further review

of the matter. *State v. Chobot*, 106 N.W. 2d 286, appeal dismissed 82 S. Ct. 136, *supra*. The Petition for a writ of certiorari should be denied.

Respectfully submitted.

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